IN THE SUPREME COURT OF THE
STATE OF FLORIDA

Case Number: **72,763**
Fourth District No. **4-86-2663**

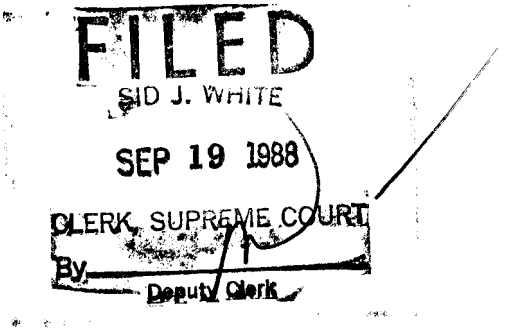
SAMARA DEVELOPMENT CORPORATION,

Petitioner,

vs.

RICHARD MARLOW and MIDLANTIC NATIONAL BANK AND TRUST COMPANY,

Respondents.



DISCRETIONARY REVIEW OF THE CERTIFIED QUESTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF FOR RESPONDENT, RICHARD MARLOW

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INTRODUCTION

In this Brief, R. shall refer to the Record on Appeal A. shall refer to this Brief's Appendix. RICHARD MARLOW was styled "Plaintiff" in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida and "Appellant" in the Fourth District Court of Appeal of Florida. He will be referred to as "Respondent" in this Brief. SAMARA DEVELOPMENT CORPORATION was referred to as "Defendant" in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida and "Appellee" in the Fourth District Court of Appeal of Florida. It will be referred to as "Petitioner" herein. MIDLANTIC NATIONAL BANK AND TRUST COMPANY was joined by Petitioner as a respondent to its Initial Brief because it was a party to the instant law suit and the appeal. It will be referred to as "Midlantic" herein. The Interstate Land Sales Full Disclosure Act appears at 15 U.S.C. §1701, et seq, and shall be referred to as "ILSA" herein. The exemption contained within 15 U.S.C. §1702 (a)(2) will sometimes be referred to herein as the "improved lot" exemption. "HUD" shall refer to the Department of Housing and Urban Development. Authority was delegated to the Secretary of Housing and Urban Development pursuant to 15 U.S.C. §1715 for administrating ILSA who was further authorized to delegate any of his functions, powers and duties to employees of HUD. The Office of Interstate Land Sales Registration of HUD shall be referred to herein as "OILSR".

STATEMENT OF THE CASE AND THE FACTS

Pursuant to Rule **9.210** (c), Fla. R. App. P, the Respondent shall only state herein the areas of disagreement with the Petitioner's Statement of the Case and Facts as contained in its Initial Brief.

The Opinion entered by the Fourth District Court of Appeal of Florida filed June 15, **1988,** as revised by Order dated August 10, **1988,** does not specifically state therein that it is based upon the doctrine of stare decisis; nor does the Fourth District's Opinion state that the question at issue was certified due to a recognition by the Court of a conflict between the holding by the Fourth District Court of Appeals in a prior case and the interpretation of the statutory exemption contained in the **1979** through **1982** administrative guidelines and opinion letters issued by HUD. (A. **1-8**). Moreover, the Fourth District's Opinion does not categorically state as asserted by Petitioner that the Condominium Purchase Agreement at issue herein provides the remedy of specific performance. The Opinion does, however, contain the following language:

> In the final summary judgment the court found that the contract in question was not subject to the Act because the provision thereof affording Marlow the remedy of specific performance in the event of breach by Samara effectively exempted the contract from the provisions of the Act. (Emphasis supplied)

(A. **2**). The distinction herein is of great import due to the discussion of Issue IV enumerated hereinafter. Petitioner has

seemingly referenced in its Statement of the Case and Facts what in essence constitutes editorial comments upon its interpretation of the Opinion filed by the Fourth District Court of Appeal. Respondent assumes that such editorial comments were inadvertent and Respondent would instead direct this Honorable Court to the language of the Opinion.

Similarily, references are contained in Petitioner's Statement of the Case and Facts which erroneously state that the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida found that the Condominium Purchase Agreement afforded to Respondent herein the remedy of specific performance. In each instance in the Order on Motions for Summary Judgment where it indicates that the remedy of specific performance was afforded to Respondent such reference is preceded by the language "a right in paragraph V.B." (R. 222-225) The distinction between the Condominium Purchase Agreement as a whole affording to Respondent the remedy of specific performance and an isolated provision thereof is critical in light of Issue IV which will be discussed hereinafter.

In addition, Petitioner asserts in its Statement of the Case and Facts what in essence constitutes a legal argument as to the weight to be afforded to HUD's interpretation pursuant to Florida law and the actions taken by the Fourth District Court of

Appeals in the subject Opinion. Respondent submits that such legal argument should be reserved for subsequent portions of Petitioner's Initial Brief, and the Opinion issued by the Fourth District Court of Appeal interpretated based upon the language specifically recited therein.

The final area of disagreement is with regard to Respondent's deposit. Petitioner's Initial Brief does not address the identity of the individual who has custody of the same. Respondent has alleged that the subject deposit is being held in an escrow account by MIDLANTIC; however, Petitioner has alleged that such deposit is being held in an escrow account by the law firm of Sherr, Tiballi, Fayne & Schneider. (R. 68-85 and 210-212).

SUMMARY OF ARGUMENT

The case sub judice is before this Honorable Court on Petitioner's Notice to Invoke Discretionary Jurisdiction to review a question certified by the Fourth District Court of Appeals to be of great public importance. The analysis herein as a result thereof is whether the necessary remedies have been afforded to Respondent pursuant to the instant Condominium Purchase Agreement to qualify for the improved lot exemption to ILSA.

The Petitioner is not eligible for the statutory exemption contained in 15 U.S.C. §1702 (a)(2) as the Condominium Purchase Agreement limited the remedies available to Respondent. Specifically, the Condominium Purchase Agreement disclaimed any liability to the Respondent for damages. Moreover, the Condominium Purchase Agreement limits the Respondent's remedies in the event that the condominium unit is not completed within two (2) years to a refund of Respondent's deposit plus interest.

Petitioner argues based upon the 1979 and 1984 HUD Guidelines together with Advisory Opinions issued by OILSR that the only remedy which must be afforded to a purchaser to qualify for the improved lot exemption is the remedy of specific per-

formance. Accordingly, Petitioner asserts that the Opinion rendered by the Fourth District Court of Appeals conflicts with the **HUD** interpretation which, unless clearly erroneous, is controlling. However, the **HUD** Guidelines relied upon by Petitioner are not by their own terms substantive regulations. The Guidelines further state that the examples given do not exhaust the myriad of possibilities occurring in land development. Courts are the final authorities of statutory construction and in the absence of a clear statement of Congressional intent will only defer to an agency's interpretation when it has a reasonable basis in law. The 1979 Guidelines and 1984 Guidelines, which Petitioner asserts conflict with the Fourth District Court of Appeals Opinion herein, do not contain such a reasonable basis in law. They do not contain a thorough analysis or a scintilla of the reasoning for limiting the remedies which must be afforded to qualify for the exemption to specific performance. Such an interpretation would conflict with the underlying policy and legislative history of ILSA. Moreover, this interpretation conflicts with previous agency pronouncements upon the subject. Respondent would speculate that the reference to the remedy of specific performance was offered by way of example and not limitation. The Advisory Opinions similiarly relied upon by Petitioner lack power to persuade as they do not have a reaso-

nable basis in law. Moreover, the opinions relied upon by Petitioner should be disregarded as they conflict with other staff opinions requiring the remedy of damages.

The Opinion rendered by the Fourth District Court of Appeals does not conflict with HUD's most recent pronouncement of the improved lot exemption. HUD by virtue of the 1984 Guidelines defers to state law in deciding whether or not the seller has an obligation to erect a building within two years. The law in Florida both in terms of cases which have construed the statutory exemption at issue here and those decided under principals of contract law require that the purchaser be afforded the remedy of damages. The case of Dorchester Development, Inc. v. Burk, and its progeny have established that any limitation on the contractual remedies available to a purchaser is fatal to the exemption. This principal has been espoused in an unbroken line of cases since Dorchester and the Opinion from which the Petitioner filed its Notice to Invoke Discretionary Jurisdiction merely constitutes the most recent pronouncement on the subject. Moreover, the current trend of Florida contract law requires that a purchaser be afforded the remedy of damages in order to prevent the seller's obligations from being wholly illusory. To find that a seller need only provide a right of specific performance would permit the seller with impunity to sell the same unit the

following day. The necessity to include the remedy of damages to form a binding obligation upon the seller comports with the general purpose of ILSA and it should be liberally interpreted to attain that end. Advisory Opinions promulgated by OILSR both prior and subsequent to the **1984** Guidelines affirm the principal that the remedy of damages must be afforded to the purchaser so as not to disqualify the contract for the improved lot exemption.

Petitioner's assertion that public policy dictates that the public rely on the interpretation given to the exemption by HUD erroneously assumes that such interpretation conflicts with the Opinion rendered herein by the Fourth District Court of Appeals. Assuming arguendo a conflict does exist, Dorchester Development v. Burk was the precursor to the instant Opinion and clearly prohibited a limitation of remedies in order to qualify a developer for the exemption. Real estate practitioners have advocated that contractual remedies clauses be amended in response thereto or, in lieu thereof, that a developer register his project under ILSA. Practitioners could not ignore Dorchester's mandate without placing their clients in jeopardy of running afoul of the exemption. Whichever course of conduct a developer chose to follow, he would negate the purchaser's ability to rescind under ILSA and thereby preserve the developers contractual rights. Moreover, the 1979 Guidelines and **1984**

Guidelines, upon which Petitioner would seek to rely to the exclusion of Dorchester Development, Inc. v. Burk and its progeny, contain caveats as to reliance thereupon.

Aside from the necessity to include the remedy of damages to be eligible for the improved lot exemption, the remedy of specific performance was contractually limited or negated in Paragraph VI.A of the Condominium Purchase Agreement. The limitation contained in the foregoing paragraph conflicts with the language contained in an earlier paragraph which purports to afford the purchaser the right of specific performance. The provisions are mutually repugnant and cannot be interpreted so as to reconcile this repugnancy. Based on this repugnancy, a limitation of the remedy of specific performance exists and this limitation disqualifies the Petitioner from the improved lot exemption.

Because the remedy of specific performance has been limited or negated by subsequent provisions of the Condominium Purchase Agreement and, or in lieu thereof, since a contractual limitation of the right of damages is contained in the Condominium Purchase Agreement, Petitioner is not entitled to claim the benefit of the exemption to ILSA which appears in 15 U.S.C. §1702 (a)(2). Consequently, Petitioner was required to comply with the terms and provisions of ILSA including the

disclosure requirements. Petitioner's failure to comply with the disclosure provisions entitles Respondent to rescind the Condominium Purchase Agreement and to recover in damages his deposit, interest, court costs and a reasonable amount for attorneys' fees. Therefore, this Honorable Court should refuse to exercise discretionary jurisdiction herein, but, in the event that it elects to exercise same, it should affirm the Opinion rendered by the Fourth District Court of Appeals.

ARGUMENT

I. HUD'S INTERPRETATION OF 15 U.S.C. 51702 (a)(2) IS NOT BINDING AS COURTS ARE THE FINAL AUTHORITIES ON ISSUES OF STATUTORY CONSTRUCTION AND WHILE THE CONSTRUCTION PUT ON A STATUTE BY THE AGENCY CHARGED WITH ADMINISTRATING IT IS ENTITLED TO DEFERENCE BY THE COURTS IT SHOULD NOT BE ADOPTED HEREIN AS IT DOES NOT HAVE A REASONABLE BASIS IN LAW AND THEREBY LACKS POWER TO PERSUADE.

As acknowledged by Petitioner in its opening paragraph of Argument I, the purpose of ILSA is to offer protection for consumers against fraudulent real estate sales operations. Respondent acknowledges that in 15 U.S.C. 51715 the authority for administrating ILSA was delegated to the Secretary of Housing and Urban Development who pursuant to 15 U.S.C. 51718 had authority to issue rules and regulations "as are necessary or appropriate to the exercise of the functions and powers conferred upon him..." However, it is not rules and regulations which Petitioner asserts are binding upon this Court and determinative of the issue before it. Instead Petitioner asserts that it is mere Guidelines promulgated by HUD and Advisory Opinions issued by OILSR staff personel which mandate a result contrary to that rendered by the Fourth District Court of Appeals in the Opinion from which the Petitioner has filed its Notice to Invoke Discretionary Jurisdiction. HUD has in fact promulgated rules pertaining to

the exemption which appear in 15 U.S.C. §1702 (a)(2). The rules were first promulgated in 1970 under 24 C.F.R. §1710.10 (c)(1970) and are identical to the statutory exemption which it administers. (A.87). The only substantive amendment thereto occurred in 1984 when the rule, which had been renumbered to §1710.5(b), added additional language with regard to presale clauses in the cases of condominium or multi-unit construction. (A.88). This additional verbiage is unrelated to the issue before this court. Aside therefrom the language was unchanged and continues to mirror that contained within 15 U.S.C. §1702 (a)(2).

Petitioner argues in their Initial Brief that the 1979 Guidelines for Exemptions Available under the Interstate Land Sales Full Disclosure Act, 44 Fed. Reg. 24010 et. seq, effective June 11, 1979 hereinafter referred to as the "1979 Guidelines", the Guidelines for Exemptions Available under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31375 et. *seq,* effective October 1, 1984, hereinafter referred to as the "1984 Guidelines" and the Avisory Opinions appended to its brief are inconsistent with the decision rendered below inasmuch as they merely require that the contract afford to the purchaser the remedy of specific performance to qualify for the improved lot exemption. It is Respondent's position herein as more particularly described in Argument II hereof that the Opinion rendered below wherein it

requires that the contract afford the purchaser the remedies of specific performance and damages is consistent with the 1984 Guidelines and with Advisory Opinions issued by OILSR and not erstwhile referenced by Petitioner. Assuming arguendo that the Guidelines and Advisory Opinions are inconsistent with the Fourth District's opinion herein, the HUD Guidelines and Advisory Opinions relied upon by Petitioner are not dispositive nor compulsory.

The 1979 Guidelines and 1984 Guidelines by their terms do not constitute substantive law. The following comment is contained within the Introduction to the 1979 Guidelines:

> These are Guidelines, not substantive regulations. Not every conceivable factor of the exemption process is covered in these guidelines and variations may occur in unique situations. Examples are given, but the examples do not in any way exhaust the myriad of possibilities occurring in land development and land sales activity nor do they set absolute standards. (Emphasis supplied)

(A.20). A similar caveat is contained in the Introduction to the 1984 Guidelines. (A.34). The focus of Petitioner's first argument is that these Guidelines interpret the relevant exemption from ILSA and are binding upon the Court unless clearly erroneous. Petitioner's argument overlooks the fundamental premise that courts, not administrative agencies, have the ultimate responsibility for construing statutes. The "courts are the final authorities on issues of statutory construction...and 'are

not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with the statutory mandate or that frustrate the congressional policy underlying a statute.'" Volkswagenwerk v. Federal Maritime Commission, 390 U.S. 261, 272 (1968); see, Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); National Labor Relations Board v. Brown, 380 U.S. 278, 290-292 (1965).

The first question to be answered when a court reviews an agency's construction of the statute which it administers is, of course, whether Congress has directly spoken to the precise question at issue. If Congress has clearly expressed an intent contrary to that of the agency a court is obligated to enforce the will of Congress. Chemical Manufacturers Association v. Natural Resources Defense Council, 470 U.S. 116, 125 (1985); Fleetwood Enterprises v. HUD, 818 F. 2d 1188, 1193 (5th Cir. 1987). If a court determines that Congress has not directly addressed the precise questions at issue or the statute is silent or ambiguous with respect to this specific issue, the question is whether the agency interpretation has a reasonable basis in law. Id.; National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 130-132 (1944); and Unemployment Compensation Commission of the Territory of Alaska v. Aragon, 329 U.S. 143, 153-54 (1946). Accordingly, where the agency's

interpretation has a reasonable basis in law the court will defer to it. An important factor to be considered in giving weight to an administrative interpretation is if "...'the thoroughness evident in its consideration, the validity of its reasoning, is consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control. ' " Securities and Exchange Commission v. Sloan, 436 U.S. 103, 117-118 (1978), quoting from Adamo Wrecking Co., v. United States, 434 U.S. 275, 287 n.5 (1978).

Petitioner has in addition to the Guidelines placed great weight upon the Advisory Opinions issued by OILSR which are appended its Initial Brief. The analysis of same is similar but not identical to that to be given to other agency interpretations. These Opinions are unofficial and not binding upon the Court. Adiel v. Chase Federal Savings and Loan Association, 586 F. Supp 866, 868 (D.Ct S.D. FL., Miami Div 1984); Charles v. Krauss Company, Limited, 572 F.2d 544, 547-548 (5th Cir. 1978). If the letters do not contradict one another and are consistent with the act's intent and they are reasonable, a court may look to them for guidance. Id. However, staff opinion letters are less authoritative then formal interpretations and have been disregarded when they conflict with other staff opinion letters. See, Pollock v. General Finance Corporation, 552 F.2d 1142, 1144-1145 (5th Cir. 1977).

In terms of the foregoing analysis the only expression of Congressional intent as to the "improved lot" exemption is that contained within the clear language of the statute wherein it states "...the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years;" (Emphasis supplied) The statute itself does not specifically delineate the remedies required to come within its terms. If we assume therefore that the statutory language is ambiguous, we must in conjunction with the inquiry into HUD's interpretation determine whether same is supported by the overall statutory intent, policy and legislative history. See, Ford Motor Credit Company v. Milhollin, 444 U.S. 554, 568 (1980); Markair, Inc. v. Civil Aeronautics Board, 744 F.2d 1383, 1385 (9th Cir. 1984); Nepera Chemical, Inc. v. Federal Maratime Commission, 662 F.2d 18, 21-22 (D.C. Cir. 1981). It is clear that the underlying intent of ILSA was to protect consumers through disclosure. The introductory paragraph contained in the publication issued by HUD, Buying Lots from Developers states in pertinent part as follows:

> "Caveat Emptor" warned the early Romans in the marketplace.. ."let the buyer beware!" This is good advise. The Department of Housing and Urban Development's Office of Interstate Land Sales Registration (OILSR) seeks full disclosure of facts consumers need to make prudent decisions when they buy land through interstate land sales..."

(Appendix to Petitioners Brief at A.74).

The congressional hearings conducted before the Senate evidence that ILSA was intended to offer protection to buyers through disclosure which would enable consumers "...to make sound business judgments" (A. 101). ILSA was patterned after the full disclosure principal established by the Securities Act of 1933. (A.90).

With consumer protection as the underlying policy of ILSA, the question becomes how the interpretation of **HUD** as to **15** U.S.C. §1702 (a)(2) which, assuming arguendo, merely requires that a developer afford to the purchaser the right of specific performance is supported by the statutory intent, policy and legislative history. Respondent submits that it is not. Consumer protectionism would be best served not by a limitation of the remedies to be afforded to a purchaser under the contract but by one which arms him with the full array of remedies available under the law inclusive of damages. In terms of the analysis set forth in Securities In Exchange Commission v. Sloane, supra, we must evaluate the thoroughness evident in **HUD's** consideration and the validity of its reasoning to determine whether these factors give it power to persuade. There is not contained within the 1979 Guidelines nor the 1984 Guidelines a scintilla of **HUD's** reasoning which would give rise to the pronouncement as argued by Petitioner that the only remedy which

must be afforded to become eligible for the improved lot exemption is the remedy of specific performance. Such an interpretation would contradict earlier pronouncements within the Guidelines which indicate that " (a) s exceptions to the registration and full disclosure requirements of the Act, exemption requirements are strictly construed". (A.21 and 34). (Emphasis supplied) Moreover, it contradicts the pronouncement contained in the 1975 Guidelines, 40 Fed. Reg. 47166 et. seq., wherein it states that "(a)ny clause which would qualify the obligation of the Seller would nullify the applicability of the exemption." (A.15). Respondent can only speculate that the reference in the 1979 Guidelines to the remedy of specific performance was offered by way of example and not for purposes of limitation. Accordingly, the weight and deference to be afforded to HUD's interpretation of the improved lot exemption as advocated by Petitioner lacks "power to persuade" as one can only speculate as to the reasons for reaching the conclusion that HUD arguably did. Similarly, the Advisory Opinions urged upon this Court by Petitioner contain none of the thorough reasoning required to render them persuasive. To the contrary the Advisory Opinions make no reference to the content of the contracts in question other than to indicate that the remedy of specific performance had not been deleted. They also conflict with Advisory

Opinions issued in 1981 and 1987, and consequently this Court should decline to give them controlling weight. Pollock v. General Finance Corporation, supra. (A.103-106).

Petitioner relies heavily upon this Courts decision in King v. Seaman, 59 So2d 859 (Fla. 1952) and upon Winter v. Hollingsworth Properties, Inc., 777 F. 2d 1444 (11th Cir. 1985). The decision in King v. Seaman is distinguishable in that the court there adopted the construction placed upon a statute by the agency charged with the duty of executing it where the statute at issue was simply an adoption of the agency's own rule enacted after the Florida Supreme Court had accepted the agency's interpretation thereof. Winter v. Hollingsworth Properties, Inc. is similarly inapposite as the Appellate Court there found specific legislative support and prior court decisions to support HUD's interpretation. At issue there was whether HUD's inclusion of condominiums within ILSA was a reasonable interpretation of Congress original intent in enacting the statute. The Eleventh Circuit Court of Appeals determined that it was and "the only defensible interpretation given subsequent events" Id. at 1448. The court thereafter noted in footnote 10 that other courts, both federal and state, had considered the issue and agreed that HUD's interpretation was a reasonable one. Such is not the case here. There has been no interpretation by a court which has supported

the interpretation by HUD advocated by Petitioner, that the only remedy which must be afforded to qualify for the exemption contained within 15 U.S.C. §1702 (a)(2) is the remedy of specific performance. The weight of authority from all other courts which have decided this issue is specifically contrary thereto.

II. A CONTRACT FOR THE SALE OF A CONDOMINIUM IN FLORIDA IS NOT EXEMPT FROM THE PROVISIONS OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT, 15 U.S.C. §1701, ET. SEQ., PURSUANT TO 15 U.S.C. §1702(a)(2) WHERE IT PROVIDES FOR COMPLETION WITHIN TWO YEARS AND ALLEGEDLY AFFORDS THE PURCHASER WITH THE RIGHT OF SPECIFIC PERFORMANCE BUT RESTRICTS THE PURCHASER'S REMEDIES FOR A BREACH OF THE CONTRACT BY THE SELLER(S) TO A RETURN OF THE DEPOSIT OR SPECIFIC PERFORMANCE AS THE CONTRACT MUST ALSO AFFORD THE PURCHASER THE ALTERNATIVE REMEDY OF A SUIT FOR DAMAGES

This argument essentially responds to the question certified to this Court by the Fourth District Court of Appeals to be of great public importance. Respondent, pursuant to Count II of his Second Amended Complaint, sought rescission under the terms of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §1701 et. seq. The principal requirements of ILSA as they relate hereto are contained within 15 U.S.C. §1703, §1706 and §1707 which prohibit a "developer" from making use of any means or instruments of transportation or communications in interstate commerce, or of the mails, in connection with the sale of any real property such as that herein involved unless the developer has in effect a statement of record and furnishes a property report to the "purchaser" prior to execution of the contract or agreement for sale. 15 U.S.C. §1703(a)(1)(B). ILSA further provides that if no property report is furnished in accordance with the statute that the "purchaser" may revoke the contract within two years of its execution. 15 U.S.C. §1703(c); see also,

Dorchester Development, Inc. v. Burk, 439 So. 2d 1032 (Fla. 3rd DCA 1983). The penalties for violation of the provisions of ILSA are contained within 15 U.S.C. §1703 and §1709 and include, but are not limited to, the recovery of the amount the "purchaser" actually paid under the contract, interest, court costs and reasonable amounts for attorneys' fees. The terms "developer" and "purchaser" are defined terms to which petitioner has stipulated the respondent and itself, respectively, fall within the statutory definitions. (R. 210-212).

Petitioner has for all intents and purposes stipulated to the application of ILSA pursuant to the facts enumerated in its Motion for Summary Judgment on Count II with the exception of the applicability of any exemptions to ILSA. Id. The legal issues framed by Respondent's and Petitioner's respective Motions for Summary Judgment were accentuated by the Order on Motions for Summary Judgment which states in pertinent part as follows:

> 3. Based on the foregoing, the only issue before the Court is the legal issue of whether the terms of Samara's contract with Plaintiff - which terms provide for completion of the unit within two years from the date of the contract, a right in paragraph V.B. of specific performance on the part of the Plaintiff in the event of Samara's breach, and a prohibition of Plaintiff's right to sue for damages in the event of Samara's breach - exempt Samara from the requirements of the Interstate Land Sales Disclosure Act (15 U.S.C. Section 1701, et. seq.), pursuant to 15 U.S.C. Section 1702 (a)(2)....

(R. 223).

The relevant portions of the Condominium Purchase Agreement with regard to the rights and remedies of Respondent

and Petitioner in the event of default state in pertinent part as follows:

V. DEFAULT

B. Seller's Default: If Seller defaults in the performance of this Condominium Purchase Agreement, Purchaser shall give Seller written notice of such default, and if Seller within seven (7) days from receipt of such written notice shall fail to take action that would cure the default within a reasonable period of time, and if Purchaser has performed all his obligations hereunder, Purchaser shall have the right (which is Purchaser's sole remedy except as hereinafter set forth) to a refund of all monies paid hereunder plus such interest as is prescribed by the Act, in which event this Condominium Purchase Agreement shall be terminated and neither party shall have any claim against the other. Nothing contained herein shall be deemed to restrict Purchaser's remedy of specific performance of this Condominium Purchase Agreement if Purchaser shall otherwise be entitled to such remedy under applicable law. (Emphasis supplied).

VI. DATE OF COMPLETION AND CONSTRUCTION

A. The estimated latest date for completion of the condominium is June 1, 1984 . Notwithstanding anything in this Condominium Purchase Agreement to the contrary, Seller agrees and acknowledges that it is obligated to substantially complete construction of the Condominium Parcel so as to permit occupancy by Purchaser within two (2) years from the date of this Condominium Purchase Agreement; provided, however, that Seller shall not be responsible for delays incurred by circumstances beyond its control, such as acts of God, strikes, shortages and catastrophes, which interfere with Seller and the construction of the said Condominium Parcel. The last stated clause also applies to delays of like nature to the manufacturers, millworkers, builders and other suppliers to Seller. In the event said Condominium Parcel shall-not be completed within such two (2) year period, Purchaser shall have the option to cancel this Condominium Purchase Agreement by written notice to Seller and upon such cancellation Seller shall refund to Purchaser his deposit made herender plus such interest as is prescribed by the Act. Upon such refund, all parties to this Condominium Purchase Agreement shall be fully discharged and relieved from the terms and obligations hereof. Liability of Seller is limited to the return of Purchaser's payments made hereunder plus such interest as is

prescribed by the Act and in no event shall Seller be liable to Purchaser for any damages which Purchaser may sustain. (Emphasis supplied).

Respondent is assuming for purposes of argument that the right of specific performance as provided in Paragraph V.B. has not been negated by the limiting language appearing in Paragraph VI.A. The continued viability of the right of specific performance as contained within Paragraph V.B. has been addressed in the discussion of Issue IV presented hereinafter in Respondent's Answer Brief.

Petitioner, contends that it is exempt from ILSA pursuant to 15 U.S.C. §1702 (a)(2) which states as follows:

> a. Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to -
>
> 2. The sale or lease of any improved property on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years; (Emphasis supplied).

While the Condominium Purchase Agreement in Paragraph VI. A. thereof does obligate the Petitioner to "substantially complete construction of the Condominium Parcel so as to permit occupancy by Purchaser within two (2) years from the date of this Condominium Purchase Agreement", the limitation of remedies as previously quoted disqualifies Petitioner from the exemption pursuant to Dorchester Development, Inc. v. Burk, supra, and its

progeny. Dorchester Development, Inc. v. Burk holds that a contract obligating the seller to complete by a time certain is not the equivalent of a contract which limits the purchaser to the right to the return of his deposit in the event the building is not constructed by a time certain. Moreover, the purchaser, where the seller is obligated to complete by a time certain, is not limited to the remedy of rescission but may affirm the contract and seek damages. In Dorchester Development, Inc., v. Burk the condominium sales contract gave purchasers the option to rescind if their units were not completed within two years. The Third District Court of Appeals advocated a liberal construction of the Act in favor of the purchaser by virtue of the following language:

> Since the Act is to be construed to effectuate its remedial purpose of protecting the land sale consumer, McCown v. Heidler, 527 F. 2d 204 (10th Cir. 1975); Nargiz v. Henlopen Developers, 380 A. 2d 1361 (Del. 1977), we can hardly conclude that a contract which has the effect of limiting the purchaser's remedies conforms to the requirements of the Act."

Dorchester Development, Inc. v. Burk, supra at 1035.

The United States District Court for the Southern District of Florida, Miami Division, in the case of Schatz v. Jockey Club Phase 111, Ltd., 604 F. Supp. 537, 542 n. 7 (1985), adopted the reasoning of the Third District Court of Appeals in Dorchester Development v. Burk and held that a developer is obli-

gated to complete construction within two years within the meaning of the Act only if the purchaser's ability to enforce the promise is not limited by the contract. Subsequent thereto the Second District Court of Appeals in Marco Bay Associates v. Vandewalle, 472 So.2d 472 (19851, pet. for rev. den. 482 So2d 350 (Fla. 19861, held that the exemption requires an unglorified and unconditional guarantee to complete within a two-year period, and that any limitation upon the purchaser's right to "affirm the contract and seek damages or specific performance is fatal to the exemption." Id. at 474.

The Fourth District Court of Appeals opinion in Renee Berzon v. Oriole Homes Corporation, 497 So.2d 670 (Fla. 4th DCA 19861 was published subsequent to the entry of the Order on Motions for Summary Judgment and the denial of Respondents Motion for Rehearing. The holding therein was cited to and relied upon by the Fourth District Court of Appeals in its Opinion below as it declared:

> In Berzon v. Oriole Homes Corporation, 497 So.2d 670 (Fla. 4th DCA 19861, this Court appeared to have ruled squarely upon the issue presented here, holding...that a developer may not claim an exemption from the act when a buyer's relief for violation of the contract is limited to a return of the deposit or specific performance.

(A. 3 1.

The most recent pronouncements on the exemption prior to the instant case are Arvida Corporation v. Barnett, 502 So.2d 11

(Fla. 3rd DCA 1986) and Hamptons Development Corporation of Dade v. Sakler, 522 So.2d 1035 (Fla. 3rd DCA 1988). These cases essentially constitute a reaffirmation by the Third District of its prior holding in Dorchester Development, Inc. v. Burk. In Arvida Corporation v. Barnett the agreement prohibited the purchaser from seeking damages in the event of the seller's default and further denied to the purchaser the right of specific performance unless the latter was a condition to Arvida's ability to take advantage of 15 U.S.C. §1702 (a)(2). The Third District Court of Appeals held that the agreement failed to meet the statutory requirement of a bona fide obligation to construct within two years. The opinion emphasized that the loss of the exemption was due both to the contractural limitation prohibiting the right to damages and because the remedy of specific performance was made solely available to evade the disclosure requirements of ILSA.

In light of the overwhelming weight of authority contrary to its position which are represented by the decisions in Dorchester Development, Inc. v. Burk and its progeny, Petitioner has sought to challenge such holdings on the basis that they are based upon dicta in Dorchester and are expressly in conflict with the interpretations given to the exemption by HUD. Respondent herein submits that Petitioner's reasoning is faulty in the following respects. Petitioner's argument is premised

upon the 1979 Guidelines and the Advisory Opinions promulgated by HUD between 1980 and 1982 which appear in the appendix to Petitioner's Brief. However, HUD's interpretation of what constitutes a two year obligation to complete pursuant to 15 U.S.C. §1702 (a)(2) has been revised and now defers to general principals of contract law under the laws of the jurisdiction in which the project is located. (A. 36). The 1984 HUD Guidelines supersede the 1979 Guidelines. (A.34). HUD's deference to state law is consistent with earlier pronouncements whereby state law is utilized to determine an acceptable force majeure clause under the improved lot exemption. (A.15 and 22). Its application for purposes of what constitutes an obligation to erect does represent a departure from the 1979 Guidelines but not from Advisory Opinions issued subsequent thereto. The current trend of Florida contract law requires that the Purchaser be afforded the remedy of damages. Accordingly, HUD's most recent pronouncements are consistent with and not in conflict with the Fourth District's Opinion herein and in Renee Berzon v. Oriole Homes Corporation, Inc., supra.

The 1979 HUD Guidelines were cryptic in their discussion of this exemption. They state in pertinent part as follows:

> Furthermore, any conditions which qualify the obligation to complete a building within two years nullify the applicability of the exemption. Likewise, any provision which restricts the purchaser's remedy of specific performance serves to nullify the construction obligation and disqualifies the transaction for the exemption.

(A.22). It is essentially this provision upon which Petitioner relies to assert that the only remedy which must be afforded according to HUD's interpretations to qualify for the exemption is the right of specific performance. However, contrary pronouncements from HUD have been espoused beginning on August 20, 1981. An Advisory Opinion was issued on or around that date concerning the Pass Christian Heights, OILSR No.1-00766-28-8 which for the first time indicates that an exclusion or limitation upon the purchaser's right to damages would disqualify a developer for the exemption. This Advisory Opinion states in pertinent part as follows:

> We also note that the contract specifies that the purchaser shall have the right to either demand a refund of his deposit in full plus an equal amount to be paid as liquidated damages by the seller, or the purchaser may demand specific performance. Would the presence of this statement in the contract exclude or limit the purchaser's right to damages? If so, this would also condition the developers obligation and the contract would not qualify for the exemption. (Emphasis supplied)

(A.103). Subsequently, Advisory Opinions were issued by HUD on March 15, 1982, OILSR No.1-00756-09-58, and on June 25, 1982, OILSR No. 1-00793-42-11, wherein HUD clearly states that its interpretation of what constitutes a two year obligation to construct relies on principals of contract law. A contract must not allow non-performance by the seller at the seller's discretion. HUD's contractual focal point pursuant thereto "is the

reality of obligation. Whether the reality is recognized in default or remedies clauses will be the key to whether they are acceptable for use under this exemption." (A.31-32 and A.33-34 to Petitioner's Brief).

The 1984 HUD Guidelines strongly mirror this change in philosophy. The pertinent parts thereof state as follows:

> HUD's interpretation of what constitutes a two year obligation to construct the building relies on general principals of contract law in deciding whether or not the seller has, in fact, an obligation to erect a building within two years. Provisions for purchaser financing and remedies clauses are matters to be decided by the parties to the contract under the laws of the jurisdiction in which the construction project is located.
>
> However, the contract must not allow non performance by the seller at the seller's discretion. Contracts that permit the seller to breach virtually at will are viewed as unenforceable because the construction obligation is not an obligation in reality. Thus, for example, a clause that provides for a refund of the buyer's deposit if the seller is unable to close for any reason within the seller's control is not acceptable for use under this exemption. Similiarly, contracts that directly or indirectly waive the buyer's rights to specific performance are treated as lacking a realistic obligation to construct....
>
> Because of the variations in applicable contract law among the states and the many different provisions that are used by sellers in construction contracts, HUD may condition its advisory opinions under this exemption on representations by local counsel as to the current status of state law on the relevant issues. For example in the Florida case of Dorchester Development, Inc. v. Tema Burk, Schwartz and Nash, 439 So.2d 1032 (1983), the court held that there must be an unconditional commitment to complete the condominium units within two years and that the remedies available to the purchaser must not be limited. Although the opinions language was broad, it is HUD's position that the courts concern

> regarding limitations on remedies was confined to the right of specific performance. However, developers, especially those in Florida, should be aware of this deci-sion and how it may be treated by higher Florida Courts, as well as courts in other jurisdictions. (Emphasis supplied)

(A.36). Indicative of this new philosophy of deferring to the jurisdiction where the project is located is an amendment to the requirements for an advisory opinion pertaining to the improved lot exemption. Under the 1979 HUD Guidelines an advisory opinion could be obtained by merely submitting a copy of the contract of sale. (A.31). However, the 1984 HUD Guidelines now require both a copy of the contract and "an opinion of local counsel with respect to whether the contract meets the exemptions requirements under the law in the jurisdiction in which the subdivision is located." (A.44). The most recent pronouncement by HUD appears in an Advisory Opinion dated March 19, 1987, OILSR No. 1-01059-33-11, and is consistant with the Opinion rendered below. A contract was disqualified therein from the exemption where the purchaser was not able "to affirm the contract and seek damages." (A.105).

The law in this jurisdiction is that represented by Dorchester Development, Inc. v. Burk and its progeny inclusive of Marco Bay Associates v. Vanderwalle and Berzon v. Oriole Homes Corporation. These cases clearly require that the Purchaser be afforded the right of damages in order to qualify for the exemp-

tion. In furtherance thereof, Respondent does dispute HUD's interpretation of the Third District Court of Appeals "concern" in Dorchester Development, Inc., supra. The language contained within that opinion and in more recent pronouncements by the Third District in the cases of Arvida Corporation v. Barnett and Hamptons Development Corporation of Dade v. Sakler are contrary to HUD's interpretation of same. Aside from cases such as those previously cited herein which have been decided based upon ILSA and the improved lot exemption, an independent line of cases have evolved in Florida which establish a trend whereby Respondent submits the remedy of damages must, in any event, be afforded by Florida contract law. Each of these cases will be separately analyzed and the common threads between each then explored.

The first in this series is Ocean Dunes of Hutchinson v. Colangelo, 463 So.2d 437 (Fla. 4th DCA 1985). The Colangelos were contract buyers of a condominium unit who commenced an action for specific performance of a contract to compel the developer to convey the condominium unit to the buyers. The developer defended on the basis that the contract between the parties provided only one remedy to the buyer in the event of a breach, a return of the buyers deposit. Despite specific language in the contract which so limited the buyers remedies, the lower court granted the buyers specific performance. There was no issue in

this case of the developers ability to perform. The significance hereof will be commented upon hereinafter. Contrary to the buyers remedies the seller was vested with a choice of remedies including the rights to retain the deposit or to resort to any other legal or equitable remedy. The Fourth District Court of Appeals affirmed the trial court order requiring that the developer specifically perform by conveying the condominium unit to the buyers. The Fourth District in its opinion stated the following:

> (t)here is no question that parties to a contract may agree to limit their respective remedies and that those remedies need not be the same. Jay Vee Realty Corp v. Jaymar Acres, Inc., 436 So.2d 1053 (Fla. 4th DCA 1983); Wright and Seaton v. Prescott, 420 So.2d 623 (Fla. 4th DCA 1982). Such contractural provisions, however, must be reasonable to be enforced...
>
> There is nothing reasonable about the foregoing default provisions. In this contract, the sellers obligations are wholly illusory, while the buyers' are quite real. The developer can opt to sell the unit to any new buyers willing to pay a higher price then the existing contract price, or even fail to show title to be vested in the developer as required by paragraph 5 of the Agreement, with absolutely no harmful consequences; the developer must only return the buyer's own money. A return of ones own money hardly constitutes damages in any meaningful sense...

Id. at 439.

The Fourth District Court of Appeals shortly thereafter issued its opinion in Blue Lakes Apartments Ltd. v. George

Gowing, Inc., 464 So.2d 705 (Fla. 4th DCA 1985). This action was again an action by buyers of a condominium unit who instituted a suit for specific performance, compensatory and punitive damages, plus attorneys' fees. The default by seller clause of the contract specified that neither party shall have the right of specific performance and that buyers remedies were limited to the return of the entire deposit. The Fourth District affirmed the judgment of the trial court awarding compensatory damages to the buyer. After citing language from its decision in Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo, it declared:

> Blue Lakes' heads-I-win, tales-you-lose approach to defaults is *so* rapaciously skewed as to be patently unreasonable. It supports the contract by permitting one party to breach with impunity. For this reason, we rejected the identical provision in Colangelo noting that 'the seller's obligations are wholly illusory, while the buyers' are quite real'. Ibid. Such provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of law.

Id. at 709. The court therein went on to note that compensatory damages instead of specific performance were awarded since the developer had sold the unit prior to trial.

Clone, Inc. v. Orr, 476 So.2d 1300 (Fla. 5th DCA 1985) is the third case in the series and is similar in its facts to Blue Lakes. A contractual purchaser commenced an action for

specific performance and damages. The contract limited buyers remedies to a return of his deposit with interest earned to date of payment there was a specific recitation in the remedies clause negating the remedy of specific performance. As to either party to the contract the developer argued that the agreement was nothing more than an option on its part to sell the unit and if it chose not to so perform its only obligation was to return the deposit, which had done in this case. The Fifth District Court of Appeals affirmed the trial courts award of compensatory damage and quoted with approval to Sperling V. Davie, 41 So.2d 318 (Fl.1949), and Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo. It held:

> there is nothing reasonable that the interpretation which appellant places on the default provision here. To interpret this agreement as insisted on appellant would not only make it illusory, but it would be unconscionable and unfair. Certainly it would not provide the protection to a condominium purchaser to which the statute clearly entitles him and which he has a right to expect.

Id. at 1303. The developer therein sold the unit in question to another purchaser for a higher price.

The final case relied upon by Respondent follows closely to the reasoning in the previously cited cases. The Third District Court of Appeals in Port Largo Club, Inc. v. Warren, 476 So.2d 1330 (Fla. 3rd DCA 1985) affirmed in part judgments entered by the trial court awarding damages to contract purcha-

sers. The purchasers were for time share units. Following the developers refusal to consumate closings with each of the purchasers, the purchasers filed suit for specific performance and breach of contract. The opinion notes that specific performance was not granted since there was some suggestion that the time share units had been sold. The developer relied upon the contractual limitation of damages to the refund of the buyers deposits. The Third District rejected the developers reliance upon this provision and held:

> Third, as to Port Largo Club's contention that appellees' damages should be limited to the damages stipulated in the contract (i.e., the return of the purchasers deposit), we disagree since this provision renders the sellers obligation wholly illusory and would permit him to breach with impunity. Persons may limit their liability by contract, but such provisions must be reasonable to be enforced...Similar provisions limiting the sellers liability upon default to return of the buyers deposit have been held by the courts to be unenforceable...The court in Blue Lakes Apartments, Ltd. v. George Gowing, **464** So.2d at **709** stated '(s)uch provisions are antithetical to the concept of fair dealing in the marketplace and will not be enforced by courts of law.'

In each of the foregoing cases the court fashioned a remedy in light of the specific limitation clause in the arms length contracts entered into by and between the parties. In Blue Lakes Apartments, Ltd, Clone, Inc. and Port Largo Club, Inc., the buyers were awarded damages. Whereas in Ocean Dunes of Hutchinson Island Development Corp. the buyer was awarded the

remedy of specific performance. The distinguishing feature between Ocean Dunes and the former cases is that in Ocean Dunes the court noted that "(t)here is no issue here of the developer's ability to perform." Ocean Dunes, supra at 438. The three developers in the cases where damages were awarded had previously sold the units thereby defeating the purchasers ability to specifically enforce the subject contracts. The court fashioned a remedy where none existed so as to require the sellers obligations to be non-illusory and binding. The remedy was fashioned depending upon the ability of the developer/defendant to perform. Where specific performance was not available in Blue Lakes Apartments, Ltd., because the units had already been sold, it was fruitless for the court to fashion a remedy of specific performance. Therefore, in lieu thereof, the courts substituted as a remedy the loss of bargain compensatory damage.

By virtue of the foregoing, the right to compensatory damages in lieu of specific performance is required to preclude a seller from denying the specific performance remedy itself by virtue of conveying title to a unit prior to the buyer's obtaining relief. A conveyance would deprive the buyer of the specific performance remedy. Such a possibility requires the availability of a compensatory damage right in lieu of a specific performance right as a means by which the seller's obligations

are firm and his commitment non-illusory. To find that a seller need only provide a right of specific performance in a contract to sell a new condominium unit would permit the seller, with impunity, to sell the same unit the following day. If a compensatory damage provision were not required either by common law or in the provisions of the contract itself and only the return of the deposit money were required, the seller could avoid the obligations of contract by entering into two contracts for sale of the same unit and merely return the deposit monies to the buyer in the first instance.

Pursuant to the foregoing analysis the statement by the Third District Court of Appeals in Dorchester Development, Inc. v. Burk that "(w)here the seller is obligated to complete by a time certain, the purchaser is not limited, as here, to the remedy of recission, but he may affirm the contract and seek damages" is not mere dicta as asserted by Petitioner but is the gravamen of the Dorchester decision. Both damages and specific performance are necessary as existing forms of relief in the contract *so* as to preclude the seller from hiding behind the illusory bargain. While Petitioner herein has gone to great extremes to declare that it has afforded to Respondent the remedy of specific performance, the availability of that remedy is no more accessible in the instant case then to the respective buyers

in Blue Lakes, Apartments, Ltd., Port Largo Club, Inc. and Clone, Inc. On or around May 4, 1985 Petitioner entered into a Purchase Agreement for the sale of the same condominium unit at issue herein for a total purchase price of $119,900.00, which amount represents a profit of $10,500.00 over the contract sales price by and between Petitioner and Respondent. (A.65-82). Petitioner caused the subject condominum unit to be conveyed by Midlantic by Trustees Deed on or around July 2, 1985. (A.83-86).

HUD'S interpretation of the improved lot exemption relies on principals of contract law in deciding whether a seller has an obligation to errect a building within two years. HUD's concerns are in many respects identical to those of the courts in Ocean Dunes of Hutchinson Island Development Corp., Port Largo Club, Inc., Blue Lakes Apartments Ltd and Clone, Inc. in that the contract cannot allow non-performance by the seller at the sellers discretion. Absent the inclusion of the remedy of damages the sellers obligations are illusory, and he is afforded as in the instant case the luxury to breach virtually at will. Therefore, Respondents submit that under general principals of contract law in Florida and under the principals enumerated in Dorchester Development, Inc. v. Burk and its progeny the remedy of damages must be afforded to a purchaser in a construction contract to qualify the developer for the exemption under 15

U.S.C. §1702 (a)(2). The necessity to include the remedy of damages to form a binding obligation upon the developer comports with the general purpose of ILSA which was to prohibit and punish fraud in certain land development enterprises and, consequently, it should be liberally interpreted to attain that end. It should be construed not technically but flexibly to effectuate its remedial purposes. McCown v. Heidler, 527 F. 2d 204 (10th Cir. 1975); Nargiz V. Henlopen Developers, 380 A. 2d 1361 (Del 1977).

Petitioner limited the remedies available to Respondent under the instant Condominium Purchase Agreement and is not therefore exempt from the requirements of ILSA pursuant to 15 U.S.C. §1702 (a)(2). Consequently, Petitioner was required to comply with the terms and provisions of ILSA including the disclosure requirements. Petitioner's failure to comply therewith entitles Respondent to rescind the Condominium Purchase Agreement and to recover in damages his deposit, interest, court costs and a reasonable attorneys' fee.

III. PUBLIC POLICY DOES NOT DICTATE THAT DEVELOPERS ARE ENTITLED TO RELY UPON INTERPRETATIONS BY A FEDERAL ADMINISTRATIVE AGENCY WHERE THE APPELLATE COURTS OF THIS STATE HAVE CONSISTENTLY INTERPRETED A STATUTORY EXEMPTION CONTRARY TO THE INTERPRETATION GIVEN BY THE ADMINISTRATIVE AGENCY, AND THE FEDERAL ADMINISTRATIVE AGENCY REVISED ITS GUIDLINES TO RECOGNIZE THE PRE-EMINENCE OF THE JUDICIAL INTERPRETATION GIVEN TO THE EXEMPTION BY THE COURTS OF THE JURISDICTION IN WHICH THE CONSTRUCTION PROJECT IS LOCATED.

Petitioner has strenuously argued in the Initial Brief that public policy dictates that the public rely on interpretations given to the exemption by HUD. While prior to **1983** the authority in this area may have been relatively sparse, it is Respondents position herein that upon the rendition of Dorchester Development, Inc. v. Burk, supra, the Petitioner as well as the real estate practitioners upon whose affidavits Petitioner has sought to rely would be compelled to follow the mandate of that case.

Even if one were to assume that, with the exception of OILSR No. **1-00766-28-8,** the holding in Dorchester Development, Inc. v. Burk was inconsistent with the interpretation previously given by HUD, real estate practitioners could not with any degree of certainty ignore this holding or Advisory Opinion No. **1-00766-28-8** without placing their clients in jeopardy of running

afoul of the exemption. In Florida, District Courts of Appeals are courts of final appellate jurisdiction save for a narrow classification of cases made reviewable by the Florida Supreme Court. Consequently, Circuit Courts wheresoever situate in Florida are bound by a decision of the District Court of Appeals regardless of its appellate district in the absence of a contrary opinion in the appellate district where the trial court sits. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976). As such a trial court in this State would be bound under the dictates of the doctrine of stare decisis to apply the holding in Dorchester Development, Inc. v. Burk in a case before that court in the absence of contrary authority from the appellate district in which that court sits. Does Petitioner now contend that despite the fact that a county or circuit court would be bound by the decision in Dorchester Development, Inc. v. Burk, that an attorney would not similarly be bound?

Not only is Petitioner's rationale contradictory by logical extention to the holding in State v. Hayes, supra, but it presumes that developers and real estate practitioners had not relied and would not rely upon the interpretation given to 15 U.S.C. §1702(a)(2) in Dorchester Development, Inc. v. Burk. Such clearly has not been the case. One commentator advocated in May of 1984 that a developer's completion obligation clause be revised

in response to the Dorchester decision. (A.50). These comments appeared in an article in the May **1984** Florida Bar Journal entitled Recission under the Interstate Land Sales Full Disclosure Act, by Steven Peretz. The commentator therein after discussing the Dorchester decision offered the following:

> Drafting Considerations
>
> In light of the results reached in Dorchester, counsel for developers should consider tightening the provisions relating to the developers completion obligation if the developer contemplates qualifying for the **1702** (a)(2) exemption.
>
> Counselor may wish to consider the following language:
>
> Developers Completion Obligation
>
> (a) Notwithstanding anything contained herein to the contrary, developer unconditionally agrees to complete the condominium (or other described improvement) within a period of two years.
>
> (b) Said two-year period may, however, be extended due to acts of God, inability to obtain materials or any other event constituting an impossibility of performance under Florida law.
>
> (c) With respect to the developer's completion obligation, nothing contained herein shall restrict purchasers right to seek specific performance or any other remedy, if purchase is entitled to such remedies by operation of law.
>
> ...Subsection (c) expressly states that no language in the contract shall limit a purchaser's remedy of specific performance as required by the **1979** HUD Guidelines nor any other remedy as required by Dorchester.

(A.50). Moreover, Peter M. Brooke, Esq., in a lecture entitled Marketing the Condominium Project; Out of State Land Sales and

OILSR Registrations' which was given in conjunction with the University of Miami Law Center's Eleventh Institute on Condominium and Cluster Developments on October 30 through November 1, 1986, proposed that unless the developers gave the purchasers the right of specific performance and the right to sue for damages that they register under ILSA. (A.51-64).

The Petitioner seemingly advocates that Dorchester be ignored so as to preserve the ability of the public to rely on the interpretations of HUD atleast "until case law on the subject in Florida was clearly decided". However, the foregoing commentators recognized the significance of cases such as Dorchester, Marco Bay Associates v. Vandewalle, etc., and rather than blindly ignoring their mandate suggested one of two alternative courses of action in response thereto. The first would be to draft a contractual remedies clause which does not limit the purchasers remedies such as the remedy to affirm the contract and sue for damages. The second course of conduct would be to register under the Act. Whichever course a practitioner chose to follow, he would negate the purchaser's ability to rescind under ILSA and thereby preserve the developer's contractual rights.

Assuming arguendo that the HUD Guidelines and Advisory Opinions are contrary to the holding in Dorchester and its progeny, the entitlement of developers or real estate practitioners

to rely upon such interpretations is suspect. The Guidelines themself contain conditional warnings as to reliance thereupon. The **1979** Guidelines indicate as follows:

> These are guidelines, not substantive regulations. Not every conceivable factor of the exception process is covered in these guidelines and variations may occur in unique situations. Examples are given, but the examples do not in any way exhaust the myriad of possibilities occurring in land development and land sales activity nor do they set absolute standards.

(A.20). The language referenced in both the **1979** and 1984 Guidelines place the reader on notice of the conditional nature of the Guidelines and of the inability of such reader to rely upon such guidelines as substantive regulations. This limitation upon the reliance on the HUD Guidelines is otherwise mandated by the body of law which holds that courts are the final authority on issues of statutory construction.

Finally it is important to bear in mind when reviewing the policy considerations that the aim of ILSA was not the protection of developers as seemingly advocated by Petitioner but the protection of the land sale consumer. (A. **89-90** and 101-102). See, Nargiz v. Henlopen Developers, supra at **1364**. ILSA should be interpreted flexibly to attain that end.

IV. PETITIONER IS NOT EXEMPT FROM THE REQUIREMENTS OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT PURSUANT TO 15 U.S.C. SECTION 1702 (a)(2) AS THE CONDOMINIUM PURCHASE AGREEMENT LIMITED THE RESPONDENTS REMEDIES IN THE EVENT THAT THE CONDOMINIUM PARCEL WAS NOT COMPLETED WITHIN THE TWO YEAR PERIOD TO A REFUND OF HIS DEPOSIT PLUS INTEREST.

In light of the previous discussions it cannot be controverted that the denial of the remedy of specific performance would nullify the construction obligation and disqualify the instant transaction for the exemption contained within 15 U.S.C. §1702 (a)(2). An inherent conflict exists between the provisions contained in Paragraph V.B. of the Condominium Purchase Agreement and those which appear in Paragraph VI.A. Paragraph VI.A is the provision which seeks to obligate Petitioner to complete construction within two years from the date of execution of the Condominium Purchase Agreement. Paragraph VI.A states in pertinent part:

> In the event said Condominium Parcel should not be completed within such two (2) year period, Purchaser shall have the option to cancel this Condominium Purchase Agreement by written notice to Seller and upon such cancellation Seller shall refund to Purchaser his deposit made hereunder plus such interest as prescribed by the Act. Upon such refund, all parties to this Condominium Purchase Agreement shall be fully discharged and relieved from the terms and obligations hereof. Liability of Seller is limited to the return of Purchaser's payments made hereunder plus such interests as is prescribed by the Act and in no event shall Seller be liable to Purchaser for any damages which Purchaser may sustain. (Emphasis supplied).

It would appear that the provision referenced in Paragraph V.B and that quoted from Paragraph VI.A. are repugnant

to each other and cannot both stand. Respondent submits that it is not possible to interpret or construct these conflicting provisions *so* as to reconcile this repugnancy. It is a cardinal principal of contract construction that an ambiguity in a contract should be construed against the party who chose the language or drafted the contract. American Agronomics Corporation v. Ross, 309 So.2d 582 (Fla. 3rd DCA 1975), cert. denied 321 So.2d 558 (Fla. 1975); Sol Walker & Company v. Seaboard Coastline Railroad Company, 362 So.2d 45 (Fla. 2nd DCA 1978). It is beyond dispute that Petitioner supplied the form for the Condominium Purchase Agreement herein. Based upon the foregoing, the availability to Respondent of the remedy of specific performance pursuant to Paragraph V.B. has been negated or substantially limited pursuant to the language contained in Paragraph VI.A. The highlighted language is reminiscent of the relief provided to the purchaser in the case of Dorchester Development, Inc. v. Burk wherein the purchaser was limited to the right to the return of his deposit and interest in the event the condominium units were not completed by a date certain.

Respondent would acknowledge herein as it did before the Fourth District Court of Appeal in his Initial Brief that this issue was not addressed in Respondent's Motion for Summary Judgment. However, Respondent's Motion for Rehearing questioned

the viability of the remedy of specific performance due to do the contractural limitations appearing elsewhere in the Condominium Purchase Agreement. (R. 226-230). The Order on Motions for Summary Judgment does not as a whole contain a finding that the remedy specific performance was afforded to Respondent. In lieu thereof it contains a finding of fact that "(b) Paragraph V.B. of the contract between Plaintiff and SAMARA affords Plaintiff the right of specific performance in the event of SAMARA's breach." (R. 222, A.9). Similar statements are contained elsewhere in the Order on Motions for Summary Judgment. (R. 223-225). Therefore, the restriction upon the Respondent's remedy of specific performance provides an additional basis for affirmance of the Opinion rendered by the Fourth District Court of Appeals as it disqualifies the instant transaction for the exemption contained within 15 U.S.C. §1702 (a)(2).

CONCLUSION

Based upon the above and foregoing citations and authority Respondent prays that this Honorable Court deny discretionary review of the Opinion rendered by the Fourth District Court of Appeals of Florida. In the event that this Court accepts discretionary review, Respondent prays that it would affirm the Opinion rendered by the Fourth District Court of Appeals of Florida whereby the Order of the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, granting Petitioner, SAMARA DEVELOPMENT CORPORATION's Motion for Summary Judgment as to Count II of Respondent's Second Amended Complaint was reversed and the case remanded with instructions to grant Respondent's Motion for Summary Judgment as to Count II of Respondent's Second Amended Complaint and final Summary Judgment entered in favor of Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief for Respondent was furnished by mail to KATHY KAPLAN, ESQ., Sherr, Tiballi, Fayne & Schneider, Attorneys for Petitioner, SAMARA DEVELOPMENT CORPORATION, 600 Corporate Drive, Suite 400, P. O. Box 9208, Ft. Lauderdale, FL 33310-9208, and BRUCE GOODMAN ESQ. and KEVIN O'GRADY, ESQ., Ruden, Barnett, McClosky, Schuster & Russell, P.A., Attorneys for Respondent MIDLANTIC NATIONAL BANK AND TRUST CO., P. O. Box 1900, Ft. Lauderdale, FL 33302, this 16th day of September, 1988.

Glenn M. Mednick

GLENN M. MEDNICK, ESQ.